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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 576

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, MISSISSIPPI, and STATE OF MISSISSIPPI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, MISSISSIPPI, and STATE OF MISSISSIPPI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit hereinafter identified.

I.

CITATIONS TO OPINIONS BELOW

No decision or order has ever been entered by the United States District Court for the Southern District of Mississippi, from whence this cause should have come, the contentions of respondent notwithstanding to the con-

trary. The judgments of the United States Court of Appeals for the Fifth Circuit are dated July 15, 1963, and copies thereof appear hereto as Appendix "A" and "B" hereto; and copy of the opinion of said Court rendered on July 15, 1963, is attached hereto as Appendix "C", with the specially concurring opinion of Circuit Judge Bell.

II.

JURISDICTION

The judgments and opinion of the United States Court of Appeals for the Fifth Circuit were entered on July 15, 1963. A motion for rehearing was filed by petitioners but denied by the Court of Appeals on August 7, 1963, on the main appeal and on the same date on proceedings for civil contempt, and these additional orders are made parts hereof as Appendix "D" and "E" hereto, respectively. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1254(1).

III.

QUESTIONS PRESENTED

1. Do the orders of the Court of Appeals, here complained of, conflict with Sections 1921 and 1921(a)(1), 28 U.S.C.A., and the cases of *Baltimore Contractors* v. *Bodinger*, 348 U.S. 423, 75 L. Ed. 233, 75 S. Ct. 249, *Florida* v. *United States*, 285 F.2d 596 (8 Cir.), and *O'Brien* v. *Harrington*, 233 F.2d 17 (C.C.A., Dist. of Columbia)?

2. Do not the orders of the Court of Appeals for the Fifth Circuit require Theron C. Lynd to violate the laws of the State of Mississippi which have not been declared unconstitutional and have not been successfully challenged and which are presumptively valid?

(a) What effect does Article I, Section II, Clause 1 of the Constitution of the United States which provides: "The House of Representatives shall be composed of members chosen every second year by the people of the several states and the Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," have upon the court of the United States and the State of Mississippi identified with voter rights?

(b) Do not the judgments and opinions of the Court of Appeals for the Fifth Circuit hereinabove identified require Theron C. Lynd to do that which is in violation of Section 244 of the Constitution of Mississippi; Section 3235 of the Mississippi Code of 1942, Annotated; Section 3213 of the Mississippi Code of 1942, Annotated (Pocket Part); Section 241-A of the Constitution of Mississippi (Pocket Part); Section 3209.6 of the Mississippi Code of 1942, Annotated (Pocket Part); Section 3212.7 of the Mississippi Code of 1942, Annotated (Pocket Part); Section 3217-01 of the Mississippi Code of 1942, Annotated (Pocket Part); Section 3217-02 of the Mississippi Code of 1942, Annotated (Pocket Part); and Section 2111 of the Mississippi Code of 1942, Annotated, the text of all of which is fully set out in Appendix "F" hereto?

3. Is it possible to make an exception of the general rules affecting orderly administration of justice in civil rights cases and permit Circuit Court of Appeals of this nation to override and violate the application of Section 2281, 28 U.S.C.A., relating to the three judge court for determining the constitutionality of State laws and Constitution sections?

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes of the United States and the State of Mississippi, the full text of which will be set out in Appendix "F" hereto:

1. The Fourteenth Amendment to the Constitution of the United States..

2. 28 U.S.C.A., Section 1291.

3. 28 U.S.C.A., Section 1292(a)(1).

4. 28 U.S.C.A., Section 2281.

5. Article I, Section II, Clause 1, Constitution of the United States.

6. Section 244 of the Constitution of Mississippi.

7. Section 3235 of the Mississippi Code of 1942, Annotated.

8. Section 3213 of the Mississippi Code of 1942, Annotated (Pocket Part).

9. Section 241-A of the Constitution of Mississippi (Pocket Part).

10. Section 3209.6 of the Mississippi Code of 1942, Annotated (Pocket Part).

11. Section 3212.7 of the Mississippi Code of 1942, Annotated (Pocket Part).

12. Section 3217-01 of the Mississippi Code of 1942, Annotated (Pocket Part).

13. Section 3217-02 of the Mississippi Code of 1942, Annotated (Pocket Part).

14. Section 2111 of the Mississippi Code of 1942, Annotated.

V.

STATEMENT OF CASE

The United States of America on July 6, 1961, filed complaint for relief under 42 U.S.C.A., Section 1971, being the 1957-1960 Civil Rights Act, and which complaint was not before the United States Court of Appeals for the Fifth Circuit; and on January 4, 1962, the United States of America filed motion for preliminary injunction seeking to cause uniformity of practices of registration of white and negroes by the Registrar of Forrest County, Mississippi, and which motion was not before the United States Court of Appeals for the Fifth Circuit; but there was filed with the said Court of Appeals on March 29, 1962, a "Motion for Injunction Pending Appeal or in the Alternative for a Writ of Injunction." In the absence of any record whatsoever, the Assistant Attorney General of the United States and attorneys of the Department of Justice in Washington, D. C., filed with the United States Circuit Court of Appeals for the Fifth Circuit, not a record or anything official from the District Court wherein the case was pending, but a "Memorandum in Support of the Petition for an Injunction" which is in 46 pages. Chief United States Circuit Judge Elbert P. Tuttle entered order for hearing on April 6, 1962, at the United States Courthouse, Houston, Texas, on motion for injunction or in the alternative for a writ of injunction under the All-Writs Statute, without an order from the United States District Court.

The Court at Houston, Texas, heard argument without an order and without a record and without anything before it excepting what lawyers had to say orally in open court plus that in writing contained in the record in this cause, which resulted in the Court announcing within ten minutes after the argument was concluded that the motion for injunctive relief was sustained and the parties were given oral notice thereof. On April 10, 1962, the Court of Appeals for the Fifth Circuit entered an opinion and order which is not reported in 301 F.2d 818, with copy thereof attached hereto as Appendix "G", and on April 16, 1962, said Court through the Honorable Elbert P. Tuttle, Chief Judge, entered a judgment. As of April 6, 1962, the Respondents, Petitioners here, had filed a motion to dismiss, but the Court never acted thereon. A brief was furnished in support thereof which the Court probably did not have time to consider in view of the early announcement of its conclusion after the argument with no opportunity to read and consider that contained in the brief. Respondents, petitioners here, sought on April 6, 1962, to get before the panel of judges sitting for said Fifth Circuit a Memorandum of Facts in Opposition to the Petition for Injunction and the Court had no opportunity to consider this after the argument was had. There was filed a Motion to Strike on April 6, 1962, which was never heard by the Court and which challenged the jurisdiction of the Court to have made possible the application of said Rule 75(g) of Federal Rules of Civil Procedure. In the certified copy of the record, in addition to opinion appearing as Appendix "G" hereto, there appears the order signed by Judge Tuttle on April 16, 1962.

Respondents, petitioners here, felt aggrieved at that done by the United States Court of Appeals for the Fifth Circuit when there had been no completion of hearing in

the United States District Court, and where the attorneys representing the Attorney General of the United States had used up all of the time in the United States District Court for their part of the hearing and knew that the defendants had no opportunity to put on testimony and the Court had no opportunity to enter an order and no order was entered and none of the Rules of Civil Procedure relating to manner of order and provisions for appeal were carried out or entered into in any kind of way, and under these circumstances a Petition for Rehearing with Brief thereon was filed on May 1. 1962; and as a part of that furnished to the Court there was certificate of the Reporter of the District Court disclosing the facts with reference to the pendency of the cause and that the District Judge had not heard the case in its entirety. The Petition for Rehearing was denied on May 21, 1962.

All of the above substantially appears in Petition for Writ of Certiorari filed with this Court in Cause Number 355; and all of that therein contained plus the record therein identified is referred to and made as much a part hereof as if copied herein.

Thereafter a panel of three judges was ordered or ordered themselves to convene and sit as a panel of judges for the United States Court of Appeals for the Fifth Circuit at Hattiesburg in Forrest County, Mississippi, where no Court of Appeals panel of judges had ever sat before or have ever been sitting since and with no rules of the Court therefor, and after a five day hearing they proceeded to ultimately order that Theron C. Lynd be held in civil contempt but delayed hearing on criminal contempt because of the fact that conclusion was apparently reached that in a contempt proceeding of the nature here involved where the result could be either in the nature of civil or criminal contempt by way of orders a jury trial should be

awarded; and this issue is now before this Court in the case of United States of America versus Ross R. Barnett, Governor of the State of Mississippi, and Paul B. Johnson, Jr., Lt. Governor of Mississippi, bearing Number 107 in this Court, and which has been set for hearing for argument before this Court on the 21st day of October, A. D., 1963; and with deference, we say that this Court should accept jurisdiction of this cause and make available to Theron C. Lynd and the State of Mississippi the same rights as were granted to the Governor and Lt. Governor of Mississippi in another similar proceeding and hearing before this court.

Finally, it should be stated that Theron C. Lynd has, on order of the Court of Appeals for the Fifth Circuit, in multiple ways violated his oath of office and the laws of the State of Mississippi when certain constitutional provisions of the State of Mississippi and certain statutory requirements have been ignored by compulsion and force of the orders of the Court of Appeals here complained of; and all of this was done by the Court of Appeals without giving any consideration to the application of Section 2281, 28 U.S.C.A., dealing with what is generally referred to as the three judge court for determining the constitutionality of state Constitutions and laws; and as far as the State of Mississippi and the United States of America and the world are concerned, said laws and said constitutional provisions are still applicable and Theron C. Lynd should be relieved of the requirements of an Appellate Court to violate the laws of his state and the Constitution of his State, which he has sought to uphold, so long as such laws and the Constitution have not been determined void. Further, it should be stated that this is no longer a negro voting case because all of the negroes who were identified as having attempted to register have now been reg-

istered insofar as it is possible for them to be registered by the Clerk of the Circuit Court or registrar, as the case may be, and Theron C. Lynd has totally complied with the orders of the United States Court of Appeals for the Fifth Circuit and thereby purged himself of civil contempt; but he is in contempt of the laws and statutes of the State of Mississippi which are still on the law books of this state; and this presents a very serious question where a Court of Appeals, with no record before it, takes the word of some civil rights attorney and holds a registrar in contempt simply because he does not proceed to violate his oath of office, which Theron C. Lynd has already been required to do by the Court of Appeals for the Fifth Circuit, and this should not be so; and we appeal to the highest Court of this land to make a record of what is right and wrong in this field of endeavor. We need help.

VI.

SPECIFICATION OF ERRORS

The United States Court of Appeals for the Fifth Circuit erred as follows:

1. In holding that it had jurisdiction of the cause when the United States District Court had not entered an order from which an appeal could be taken as contemplated by Rule 54(a) of Federal Rules of Civil Procedure.

2. In failing to recognize that no judgment or order had been entered and no compliance had been had with Rule 58 of said Rules of Civil Procedure and that there had been no compliance with Rule 79(a) of said Rules of Civil Procedure which requires the Clerk of the Court to make a brief notation on the docket showing the substance of each order, and until this notation is had there could be

no finality to anything done by said District Court and there could be no appeal.

3. In holding that the Court had jurisdiction over the controversy when there was total failure of plaintiff, Respondent here, to comply with and conform to Rule 75 of Federal Rules of Civil Procedure, and particularly Rule 75(g) thereof.

4. In holding that there existed before the Court controversy within the meaning of Article III, Section 2, of the Constitution of the United States, between the United States of America and the State of Mississippi in this cause.

5. In holding Theron C. Lynd in civil contempt in spite of the fact that he had followed the orders of the Court and violated the laws of the State of Mississippi and the Constitution thereof, all as hereinabove set forth.

VII.

REASONS RELIED ON FOR GRANTING THE WRIT

The opinions of the Court of Appeals for the Fifth Circuit failed to recognize many fundamental issues of law; and in the application made of the absent record and of rules controlling same, the Court denied your Petitioners due process and equal protection of the law guaranteed to them by the Constitution of the United States as interpreted by the Supreme Court of the United States.

There was a total absence of consideration by the Court of Rules 54, 58, 75(g) and 79(a) of Federal Rules of Civil Procedure. If the Court of Appeals had awaited a time with patience when the District Court could have heard the matter and reached some reasonable opinion based on the facts and law applicable thereto at the time, then a judgment would have been entered and all neces-

sary records would have been made in the trial court and the appeal would have been as contemplated by said Rule 75; but this was not so and there was a hurried hearing not supported by law or reason.

In addition to the foregoing, the Court of Appeals did what Circuit Court Judge Bell identified as what courts should not do, and which Judge stated that the Court of Appeals "might have avoided the necessity of this court taking the case over prior to a decision in the District Court. It would have avoided the multitudinous handling, by way of contempt hearing and otherwise, since the grant of the original relief by this Court, with no further action having been taken in the interim on the main case in the District Court. This case serves as a classic example of the pitfalls to be encountered, with the attendant disruption and delays in the orderly administration of justice when courts depart from the time-tested processes of law." We were quoting from the last paragraph of the concurring opinion of Circuit Judge Bell rendered on July 15, 1963.

The most humble citizen of the American Republic who has understanding must recognize that courts and men, public officials everywhere, are granted that respect which they duly deserve. Lawyers in this nation are concerned when courts require public officials of a given state to violate the valid laws of that state, which is what the Court of Appeals for the Fifth Circuit has done with Theron C. Lynd and indirectly with the State of Mississippi. This is a dangerous precedent which must be destructive to the American way of life. Here Theron C. Lynd has been required by court order of an Appellate Court to violate his own state laws and to violate his own state Constitution when such laws and such Constitution still control all of the people of the State of Mississippi except Theron C. Lynd because the constitutionality thereof has not been

challenged, the "time-tested processes of law" have not been used to determine the constitutionality thereof. The invalidity as far as Theron C. Lynd is concerned is made so by the sweeping order of the court with no right or authority therefor and with no right vested in the panel of judges who made the order. This nation cannot last as a nation of laws if the courts of the land are the ones first to violate the laws and to require others, under threat of contempt, to violate same. Here Theron C. Lynd is held in contempt for not having violated the laws and he was ultimately required to violate the laws and still he was held in contempt. We can only appeal to this court as a court of last resort to see that justice is done.

1. The appellate court had no order before it of the District Court because there was none, and the Federal Court and the appellate court had no jurisdiction of its own to protect, and as stated by Circuit Judge Bell in his concurring opinion of July 15, 1963, "it was more properly a matter for mandamus."

We call to the attention of the Court that contained in brief for respondents, petitioners here, filed in the Circuit Court of Appeals for the Fifth Circuit when there was hearing at Houston, Texas, on April 6, 1962. It should also be mentioned that in the cases of *McGuire* v. *Todd*, 198 F.2d 60 (5 Cir.), 97 L. Ed. 649, and *Tucker* v. *National Linen Service Corporation*, 200 F.2d 858 (5 Cir.), that court held that pleadings in civil rights cases must be stated with particularity in order to grant a motion for production under Rule 34 of Federal Rules of Civil Procedure. Said Court in denying relief relied upon the cases of *Piest* v. *Tide Water Oil Co.*, 26 F. Supp. 295, and *Employers Mutual Liability Insurance Company* v. *Blue Line*, 2 F.R.D. 121, and *Hartford Bank & Trust Company* v. *E. F. Drew & Company*, 13 F.R.D. 127. These cases ought still

to be the law and if applied here would require a different conclusion from that reached by said Court of Appeals for the Fifth Circuit even though there had been a record. We desire to call to the attention of this Court that appeals to the Circuit Court of Appeals are limited to statutory appeals and in this instance are limited to 28 U.S.C.A., Section 1291, or to Section 1292(a)(1) thereof. We quote from said Section 1291 and Section 1292(a)(1) as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." *28 U.S.C.A., Section 1291.*
>
> "(a) The Courts of Appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the District Court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; * * *." *28 U.S.C.A., Section 1292(a)(1).*

This Court has spoken on this through Judge Reed, speaking for five members of this Court, and Judge Burton speaking for himself, and then there was the dissent by Judges Black and Douglas. Stated differently, six of the eight judges participating were behind the opinion from which we here quote as follows:

> "This court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized exten-

sion or reduction of jurisdiction, direct or indirect, occurs in the federal system. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 451, 79 L. Ed. 583, 586, 55 S. Ct. 313. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 99 L. Ed. 233, 75 S. Ct. 249.

We must recognize that courts do differ about constructions and thus the reason why sometimes the law is not the same all over this country and this may be the reason why this Court sometimes takes jurisdiction because there is different law found in different Circuits under the same subject matter. We are here dealing with 28 U.S.C.A., Section 1292(a)(1). This very section was before the United States Court of Appeals for the Eighth Circuit on December 22, 1960, when a decision was handed down by Judge Ban Woosterhout. In that case there was considerable discussion, but the part which we desire to call to the attention of the Court, and for the reason that the Court of Appeals for the Fifth Circuit has indicated that liberal construction ought to be given to the statute so as to get to a desired end, is as follows:

> "Appellants argue that the December 31 order is in practical effect the appointment of a receiver. The answer to this contention is that statutes authorizing interlocutory appeals are to be strictly construed. Changes in appeal jurisdiction should be made by appropriate legislation, not by judicial modification. 'It is the responsibility of all courts to see that no unau-

thorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system.' Baltimore Contractors v. Bodinger, 348 U.S. 176, 181; 75 S. Ct. 249, 99 L. Ed. 233. The court there held that an order refusing to stay a trial for arbitration proceedings did not constitute a refusal to grant an injunction and hence did not authorize an interlocutory appeal." *Florida v. United States*, 285 F.2d 596.

May we suggest that the Eighth Circuit felt obligated to follow this Court in the *Baltimore Contractors* case aforesaid. In the *Florida* v. *United States* case last above cited, in quoting from the case of *Shirvin* v. *Mesta*, 141 F.2d 668 (10 Cir.), a very few words imply what we are trying to say here, and thus, "But on appeal from an appealable order or from the final judgment. * * *" *Shirvin* v. *Mesta, supra.* It will be noted that the Tenth Circuit, as did the Eighth Circuit and as did this Court, felt that there must be an appealable order or a final judgment and there was neither here. In the memorandum filed by the Government before the said Court of Appeals for the argument on April 6, 1962, there were cited cases in support of contention that it was not necessary for an order to be entered by the District Court in order to take an appeal under 28 U.S.C.A., Section 1291 or 1292(1), and these cases are: *Connell* v. *Dulien Steel Products*, 240 F.2d 414 (4 Cir.), *Ettelson* v. *Metro Ins. Co.*, 317 U.S. 188, *General Electric Co.* v. *Marvel Co.*, 287 U.S. 430, and *United States* v. *Wood*, 295 F.2d 772 (5 Cir.). In the *Connell* case, *supra*, decided by the Circuit Court of Appeals for the Fifth Circuit, the District Court granted a temporary restraining order without any time limitation as prescribed by the Federal Rules, and the "restraining order" remained in effect longer than ten days. The question there was whether the "restraining order" became a "temporary injunction," and thus appealable under 28 U.S.C.A., Section

1292(1) at the expiration of the ten day period. The Court there said that it was unnecessary for it to determine whether the order should have been designated as a preliminary injunction rather than a temporary restraining order. Significantly enough, the Court held that the "temporary restraining order" did not become a "temporary injunction" by the expiration of the ten day period, and dismissed the appeal. Surely, *Connell* presents a much stronger case for the application of the "practical effect doctrine" urged by the United States than does the case at hand in which the District Judge specifically declined to take any action upon the injunction until the hearing had been completed and all of the evidence heard.

In holding that the appeal was not proper in *Connell, supra*, Judge Tuttle, writing for the Court, made the following proper ruling:

> "The practical reasons for not generally allowing appeals from temporary restraining orders are that * * * (3) the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts. * * *
>
> "It is not at all clear that the Court below would actually have granted a preliminary injunction, for there are several legal questions that might well have been passed on at such a hearing. Orderly procedure requires that the trial court be given the opportunity of passing on these legal matters at the time of the hearing of the motion for preliminary injunction. * * *" *Connell* v. *Dulien Steel Products, supra.*

The rationale of the *Ettelson* case, *supra*, and the *General Electric* case, *supra*, is similar to *Connell, supra*. In *Ettelson* this Court held that an order of the District Court setting a hearing on a counterclaim which prayed for an injunction against further prosecution of the com-

plaint prior to trial on the issues formed by the complaint and answer was equivalent to the granting of an injunction against the prosecution of the complaint on theory that a stay by a court of equity of proceedings at law is an injunction, and thus appealable. In the *General Electric* case, *supra*, plaintiffs brought an action against defendant for infringing of patent rights and in their answer defendants set up a counterclaim alleging that plaintiffs were infringing their patent rights and prayed for injunctive relief. The Court entered an order dismissing the counterclaim, and the defendants appealed on the ground that the dismissal constituted a denial of the injunction. This Court held that the order of dismissal of the Counterclaim praying for injunctive relief was a denial of an injunction and thus appealable. None of these cases do violence to the position we take; none of these cases give any comfort, when properly analyzed, to the contention made for the Government of the United States. In every one of these cases there was an order entered by the District Court, and there is no semblance of an order here and there is no semblance of a correlation or any kind of analogous thinking between those cases and the problem we have here and they are simply no authority for what the Court of Appeals for the Fifth Circuit has done; but on the contrary, they positively and affirmatively support the position taken for Petitioners in this cause.

Other cases cited by the opposition before the Court of Appeals in support of that which said Court has done are just as far away from the law necessary to make possible any such holding as said Court has now sought to have done.

As an anti-climax of the presentation here sought to be made and with view of further showing the great divergency of view and surely diversion with that done by

the Court about which we are making complaint, the United States Court of Appeals for the District of Columbia said of attempted appeal where there had been no compliance with Federal Rules of Civil Procedure, and particularly Rule 79(a), the following:

> "Rule 79(a) of the Federal Rules of Civil Procedure requires the clerk to enter in the civil docket a brief notation showing the substance of each order and judgment of the court. Rule 58 provides that such notation in the civil docket constitutes the entry of the judgment; and the judgment is not effective before such entry. Until the order or judgment is entered in the civil docket, the case is still in the District Court, there is no finality, and there can be no appeal." *O'Brien* v. *Harrington*, 233 F.2d 17. (Dist. of Col.)

We quote from the first paragraph of the specially concurring opinion of Circuit Judge Bell, rendered on July 15, 1963, identified with the powers of the Court and the failure of the Court to do what time-tested processes of law contemplate and require. Stated differently, Judge Bell recognized that the Court of which he was a part had failed in itself; and in spite of this Theron C. Lynd is held in contempt of a court which is admittedly violating the time-tested processes of law. We quote as follows:

> "I concur, with the following additional statement. This court had the power under the All Writs Statute, 28 U.S.C.A., § 1651, to take the action it took on the former appeal. United States versus Lynd, 5 Cir., 1962, 301 F.2d 818. However, in my judgment it was more properly a matter for mandamus. The issue did not go to a denial of temporary relief as such, but to a delay in granting or denying the relief and this court should have spoken to the District Court through a Writ of Mandamus." *United States of America* v. *Theron C. Lynd et al.* (Unreported).

2. In the absence of the official record duly certified by the Clerk of the District Court as provided by Rule 75(g) of Federal Rules of Civil Procedure, no facts or proceedings were before the Circuit Court of Appeals for the Fifth Circuit, even if there had been an order, and there has been none.

Rule 75 of Federal Rules of Civil Procedure deals with the kind of record which must be had on appeal to a court of appeals and sub-section (g) thereof provides that the record must be prepared by the clerk and necessary parts are identified, and said sub-section (g) of said Rule 75 is as follows:

> "The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusion of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; *the opinion; the judgment or part thereof appealed from;* the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The Clerk shall transmit with the record on appeal a copy thereof for use in printing the record, if a copy is required by the rules of the circuit court of appeals." *Rule 75(g), Federal Rules of Civil Procedure.*

Please note from the record and from all therein contained that there is no seal of the Clerk of the District Court, there is no certificate, there is no compliance with any part of sub-section 75(g), and there is no opinion of

said District Court because said Court had not gotten through with the case and there is no judgment because there is no judgment which has been entered and there is no part of a judgment, and there is no semblance of any kind of order and said Circuit Court of Appeals did not have before it what Rule 75(g) requires; but it may be in civil rights cases that these Federal Court Rules do not apply and that we ignore them and ignore all the other great laws of the land dealing with states rights and the stable rights of the majorities and other human rights which have been in existence since the beginning of man and simply be sure that those who have written the civil rights law can do no wrong. In all of the decisions of the courts heretofore there has been a great effort to dignify these Federal Court Rules which were a part of the creative imagination of the Supreme Court of the United States. Courts have generally held that a transcript not certified by the Clerk of the District Court *does not become a part of the record on appeal and will not be considered and* this is particularly so where its accuracy and completeness is attacked; and we have sought to attack the accuracy and the completeness of that which was presented in this cause, and in addition thereto, there is no semblance at trying to in any kind of remote way comply with Rule 75(g) in this cause by the Government of the United States and we do believe that some of the attorneys for the Government of the United States may make errors. We only here seek the assistance of this Court to determine whether there is error which has been made by the Government in trying to get relief from said Circuit Court of Appeals when it was not in the position jurisdiction wise or otherwise to grant any relief or to do anything whatsoever which would be satisfactory to the office of the Attorney General of the United States. On this general subject

the Circuit Court of Appeals for the Seventh Circuit, in dealing with Rule 75(g), was much concerned with a transcript of record which was not certified by the clerk and held that same never became a part of the record because there was no compliance with Rule 75(g). There was an additional transcript of the record and the court held that the compilation was not a part of the record. We quote from the opinion as follows:

> "National also moved to strike the additional transcript of record for the reason that the transcript filed was not certified by the Clerk of the District Court. As we have pointed out above, it is true that the additional transcript filed in the office of the Clerk of this Court was not so certified. For that reason the additional transcript never became, and is not now, a part of the record on these appeals." *In re Chapman Coal Co.*, 196 F.2d 779.

There must not only be an order but there must also be a record and that is what we are trying to argue here; and in the same case we have quoted from last above we quote again as follows:

> "Where, as in this case, there has been a hearing in the District Court in which the parties have participated by their attorneys, where evidence has been heard, and where the District Court has entered an order which would be justified by evidence which might have been adduced or agreements which might have been made between the parties in such hearing, the burden is upon the party appealing from such an order to include in the record on appeal a proper transcript of the hearing to show that there was no such evidence or agreement. All possible presumptions are indulged to sustain the action of the trial court. It is, therefore, elementary that an appellant seeking reversal of an order entered by the trial court must furnish to the appellate court a sufficient record to

positively show the alleged error." *In re Chapman Coal Co., supra.*

What we are trying to say from the opinion above, and we could quote many of them, is that every appeal contemplates an order and every order carries with it the presumption that it is correct and the only way that said Circuit Court of Appeals could get jurisdiction or assume jurisdiction or attempt to protect its own jurisdiction is that an order be entered. Until there is an order, said Court must be silent. It must know that it had no jurisdiction and it should not have taken jurisdiction when it had none. Our whole jurisprudence is based on this kind of situation and we appeal to this Court to look at this for the sake of protection of our judicial system in this nation. Somehow we believe that people get excited about the so-called "civil rights" and forget every single solitary thing that has ever existed in this nation under the law. We talk about Law Day and World Court and decisions under the law; and in this nation of ours which is promoting this kind of thing with the President of the United States making a part of the headlines his own pictures for Law Day last year, there is another challenge to us that we in the name of humanity and for the protection of humanities be careful that we not encroach upon the terms and provisions of the Constitution of the United States and that we not encroach upon the simple proceedings and procedural requirements brought to us under the common law and by statutes. Court-made law belonging to legislative bodies is a dangerous thing. In this day some of us feel that the judiciary is becoming legislative in many areas of our living and it is hoped that the three departments of Government contemplated by the Constitution of the United States will never tend towards destroying us or dragging us into grave misunderstandings

between ourselves about what the law is or what it ought to be.

The Court of Appeals for the Ninth Circuit has held that the record on appeal must show the judgment appealed from. If it does not, the appellate court may direct that the record be supplemented. We refer to the case of *United States Fidelity & Guaranty Co.* v. *Anderson Construction Co.*, 260 F.2d 172.

In a case arising in the Ninth Circuit with decision dated January 5, 1959, and with the opinion written by Circuit Judge Barnes, it was held that the Federal Rules do not require a transcript or even a part of it to be part of the record on appeal, but it is further held that the Court of Appeals could decide only questions which could be determined from what record there was before it, and all others must be presumed waived. In the particular case to which we refer there was something for the Court to decide but it specifically decided that it could only consider official records, and that is to say records which come by way of the Clerk of the District Court where there is a proper certificate and where there must be knowledge on behalf of the Court of Appeals that it is a genuine official record. Such is not the case here and we quote from the case of the Ninth Circuit in part as follows:

> "The first question presented then is whether, with no record before us, and no question raised on this appeal, either as to the legal sufficiency of the complaints in intervention to state a cause of action, or as to the fairness of the instructions given, there is anything before this Court upon which it can rule." *Springer* v. *Best*, 264 F.2d 24.

As said Rule 75(g) of Federal Rules of Civil Procedure affects the rights of the parties and has a controlling force

thereto, there likewise are Rules 54(a), 58 and 79(a) and we shall make no further reference thereto but all of same are rules affecting the rights and powers of District Courts and of Courts of Appeal.

3. The United States Court of Appeals for the Fifth Circuit violated so many time-tested processes of law, they being an assignment of judges to proceed to Hattiesburg, Mississippi, for a hearing which lasted five days; and two of the judges of the panel, Judges Brown and Wisdom, have recently been identified in dissenting opinion of Circuit Judge Cameron in the case of *Armstrong* v. *Birmingham*, which is not yet in the reported cases. The Court should have resorted to mandamus proceedings if there was determination that the subject matter of the litigation be lifted from the United States District Court to the Court of Appeals; and the Court of Appeals for the Fifth Circuit should not have required Theron C. Lynd, by order of the Court, to violate the statutes and Constitution of the State of Mississippi as was done; and the whole proceeding has resulted in disorder and misunderstanding and in multiple law violations.

Theron C. Lynd was compelled to act in disregard and violation of the cited constitutional and statutory provisions of the State of Mississippi. He is and will continue to be subject to the penal sanctions of Section 2111 of the Mississippi Code of 1942, appearing in Appendix "F" hereto. None of the constitutional and statutory provisions of the State of Mississippi hereinabove referred to have been attacked as unconstitutional in this cause; no court has ever held or been called upon to hold that any of the constitutional and statutory provisions are invalid or unconstitutional. Each of these constitutional and statutory provisions are presumptively valid and constitutional and of binding force and effect upon the parties to this

cause. This required violation of the State laws and Constitution by the Court orders here complained of is the most serious of all of the matters raised herein; and if we cannot get this Court to come to our rescue, the consequences nationwide will be sad indeed.

The judgments and orders of civil contempt and the opinions of the Court of Appeals for the Fifth Circuit have all compelled Theron C. Lynd to act in disregard of and in violation of constitutional and statutory provisions of the State of Mississippi which are presumed to be valid and which have not been challenged as to constitutionality. We refer to same as follows:

Sub-section (b) of the Judgment and Order of Civil Contempt, found on Page A9 of Appendix "B", which orders petitioner to give any negro applicant for registration only certain specified sections of the Constitution of Mississippi to copy and interpret is violative of Section 244 of the Constitution of Mississippi (Page A21 of Appendix "F"), Section 3235 of the Mississippi Code of 1942, Annotated (Page A22 of Appendix "F"), and Section 3213 of the Mississippi Code of 1942, Annotated (Pocket Part) (Page A23 of Appendix "F"). Said constitutional provisions and statutes provide in essence that one of the qualifications for registration and voting is that a person shall be able to read and write any section of the Constitution of Mississippi and give a reasonable interpretation thereof to the county registrar. The Constitution of Mississippi contains some 285 sections, and it is a valid requirement for registration in Mississippi that an applicant be able to read and write and give a reasonable interpretation of any of these sections. It is left to the judgment and discretion of the registrar to determine which of these sections should be given any applicant for regis-

tration. The terms and provisions of said Sub-section (b) which restricts the registrar in his choice of sections to give negro applicants for registration to 14 sections of the Mississippi Constitution is clearly violative of these valid and constitutional provisions.

The provision of Sub-section (c) of the Judgment and Order of Civil Contempt (Page A10 of Appendix "B") which orders petitioner to cease registering the applications of negro applicants and to cease denying registration of negro applicants on the grounds that they made errors or omissions on their application form, if the applicant meets certain substantive qualifications, is in direct violation of Section 3213 of the Mississippi Code of 1942, Annotated (Pocket Part) (Page A23 of Appendix "F"), which provides in pertinent part that no application shall be approved or the applicant declared qualified to register to vote unless *all* blank spaces in the application and the oath are properly and responsively filled out by the applicant, and that the oath, as such, shall be signed by the applicant, and that the application, as such, shall be signed separately by the applicant at the place thereon provided for applicant's signature.

This portion of Sub-section (c) of the Order clearly compels petitioner to violate the mandatory provisions of said Section 3213.

That portion of Sub-section (c) of said Judgment and Order of Civil Contempt (Page A10 of Appendix "B") which orders petitioner to cease rejecting the applications of negro applicants who possess certain qualifications is directly violative of Section 241-A of the Constitution of Mississippi (Page A25 of Appendix "F") and its implementing statutes, Sections 3209.6 of the Mississippi Code (Page A25 of Appendix "F"), Section 3212.7 of the Missis-

sippi Code (Page A26 of Appendix "F"), Section 3217-01 of the Mississippi Code (Page A28 of Appendix "F"), and Section 3217-02 of the Mississippi Code (Page A28 of Appendix "F").

Section 241-A of the Mississippi Constitution, *supra*, provides that in order for a person to be entitled to register to vote, such person shall be of good moral character, and that the Legislature shall have the power to enforce the provisions of that section by appropriate legislation.

Section 3212.7 of the Mississippi Code, *supra*, provides in substance that before the registrar gives consideration to the sufficiency of the application the registrar shall have the name and address of the applicant published for two weeks in a newspaper with county-wide circulation, and that within 14 days after the date of last newspaper publication, any qualified elector of the county other than the registrar, may challenge the good moral character of the applicant and any other requirement which applicant must meet in order to be qualified to register. In the event such a challenge is made, the registrar shall within a reasonable time determine whether applicant is entitled under the Constitution and laws of the State of Mississippi to register to vote.

Section 3217-01 of the Mississippi Code, *supra*, provides that the good moral character of an applicant to register to vote is material to his right to register.

Section 3217-02 of the Mississippi Code, *supra*, provides for the challenge of any applicant to register by a qualified elector of the county on the grounds of lack of good moral character or any other requirement for registration.

It is obvious that this portion of Sub-section (c) of the Judgment and Order of Civil Contempt compels petitioner to ignore and violate the above cited good moral character requirements for registration, which requirements are presumed to be valid and constitutional.

Having demonstrated that various terms and provisions of the Judgment and Order of Civil Contempt compel petitioner to act contrary to, and in violation of, several valid provisions of the Constitution and laws of the State of Mississippi, we will now show that such action by the Court of Appeals was contrary to the settled law.

At *28 Am. Jur.*, Page 689, *Injunctions*, Section 186, the general rule is stated thusly:

> "Preventive relief against the enforcement of statutes is in most instances predicated on invalidity, for it is quite settled that equity will not attempt to restrain the carrying into operation of a valid enactment."

Many cases are cited in support of this statement in American Jurisprudence, including *Stafford* v. *Wallace*, 258 U.S. 495, 66 L. Ed. 735, and *Weber* v. *Freed*, 239 U.S. 325, 60 L. Ed. 308.

The Supreme Court of the United States, in discussing this type situation, stated:

> "Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties." *Hawks* v. *Hamill*, 288 U.S. 52, 77 L. Ed. 610.

In another case, the Supreme Court of the United States made this statement of the rule:

> "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy. Fenner v. Boykin, 271 U.S. 240, 243, 244, 70 L. Ed. 927, 928, 46 S. Ct. 492; Massachusetts State Grange v. Benton, 272 U.S. 525, 527, 71 L. Ed. 387, 390, 47 S. Ct. 189; Matthews v. Rodgers, 284 U.S. 521, 525, 76 L. Ed. 447, 451, 52 S. Ct. 217; cf. Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264, 273, 78 L. Ed. 307, 313, 54 S. Ct. 154." *Pennsylvania* v. *Williams*, 294 U.S. 176, 79 L. Ed. 841.

Our search of the controlling authorities fails to reveal a single case in which any Court has done that which the United States Court of Appeals for the Fifth Circuit has ordered done in this cause.

In causing the petitioner to violate and disregard the above-mentioned constitutional and statutory provisions of Mississippi, the Court of Appeals is subjecting petitioner to the criminal sanctions imposed by Section 2111 of the Mississippi Code of 1942, *supra* (Page A28 of Appendix "F"), which provides that if any registrar shall register any voter not entitled to registration, he shall be punished, on conviction by imprisonment for not less than one year nor more than three years. It is manifestly unfair and oppressive to put petitioner, Theron C. Lynd, in the position of subjecting himself to the penal sanctions of the criminal laws of the State of Mississippi in order to comply with the terms of an injunction. Petitioner earnestly submits that this fact and circumstance, in and of itself, is sufficient grounds for the granting of this petition.

The judgment and order of Civil Contempt is clearly in violation of the letter, spirit and intent of the three-judge statute, 28 U.S.C.A., Section 2281, which provides

that no injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any State officer in the enforcement of such statute, shall be granted by any court, except by a three-judge district court.

The Court of Appeals should not be permitted to thus circumvent the clearly expressed policy of Congress in enacting said Section 2281.

Another reason why the petition should be granted is that the operation and effect of said Judgment and Order of Civil Contempt is to deny the equal protection of laws to the white citizens of Forrest County, Mississippi. Said Judgment and Order of Civil Contempt requires petitioner to apply only certain of Mississippi's valid requirements for registration to negro applicants for registration, but leaves in total effect all of Mississippi's requirements for registration in said County as to white applicants for registration. In short, under the terms of the Court order, white applicants for registration must comply with the good moral character requirements, and must be able to read and write and give a reasonable explanation of any section of the Constitution of Mississippi, and must completely and responsively fill out all blanks in the application form, while, on the other hand, negro applicants for registration are completely exempt from meeting and complying with these valid requirements of Mississippi law. It has been settled since the case of *Bolling* v. *Sharpe*, 347 U.S. 497, 98 L. Ed. 884, that if the United States violates the "equal protection clause" of the Fourteenth Amendment, that such also constitutes a denial of "due process of law" protected from Federal violation by the Fifth Amendment.

WHEREFORE, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court, and that this petition should be sustained and writ of certiorari issued as contemplated by law.

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